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No. 55

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.
Petitioner

v.

AMERICAN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
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AMERICAN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

I. BOTH ISSUES RAISED BY THE COMPLAINT ARE BEFORE THIS COURT.

The Company contends, in its Brief (p. 25), that the only issue before this Court is whether the Union's grievance is subject to arbitration under Article II Section 10A(3) of the collective bargaining agreement. It argues that the Union's claim for arbitration under Article II, Section 10A (3) was "dismissed" by the district court, and that the Union abandoned that claim when it failed to appeal the "dismissal."

In order to demonstrate the error of this argument, it is necessary to summarize the procedural history of this case.

The Union's complaint was in two Paragraphs. Paragraph I alleged that the Company was obligated to arbitrate

the grievance under Article II, Section 10A(1) of the agreement, providing for arbitration of alleged violations of the terms of the agreement. Paragraph II alleged that the Company was obligated to arbitrate the grievance under Article II, Section 10A(3) providing for the arbitration of alleged noncompliance with past practices (R. 4-7). The Union moved for summary judgment on Paragraph I of its complaint (R. 17). The Company moved for summary judgment as to *both* Paragraph I and Paragraph II (R. 24).

The district court disposed of the summary judgment motions with the following order:

> "The Motion of the plaintiff for Summary Judgment as to Paragraph I of the amended complaint is granted.
>
> "Defendant's motion for Summary Judgment as to Paragraph I of the amended complaint is denied.
>
> "Defendant's Motion for Summary Judgment as to Paragraph II of the amended complaint is denied.
>
> "Since the questions raised by Paragraph II of the amended complaint are now moot, Paragraph II is ordered dismissed" (R. 38).

It is apparent from this order that the district court did not rule against the Union, or in favor of the Company, on Paragraph II of the complaint. On the contrary, the court specifically denied the Company's motion for summary judgment with respect to both Paragraph I and Paragraph II. But the court adopted the view that its decision in the Union's favor under Paragraph I was in itself sufficient to give the Union the full relief which it was seeking, and thus it dismissed Paragraph II as "moot."

In accordance with this view, the district court's "Judgment and Decree" directed the Company "to join with the plaintiff in the submission of the grievance described in the complaint to arbitration in accordance with the provisions of the collective bargaining agreement . . ." (R. 42). Plainly,

this order required the Company to arbitrate the grievance in its entirety.

It is immaterial whether the district court was correct in its view that Paragraph I of the complaint was a sufficient basis for granting the full relief sought in the complaint.[1] If the court erred in this regard, the error was in favor of the Union. Surely the Union had no basis for appealing the district court's decision, since the decision gave the Union everything it asked for. Only the Company had grounds for an appeal.

The Company filed a notice of appeal "from the final judgment entered in this action on March 13, 1963" (R. 43). This necessarily brought the entire case before the court of appeals. Indeed, the Company's brief to that court stated as the first of "the contested issues" to be decided on appeal the following:

> "Whether the defendant did or did not breach its agreement with the plaintiff union when it refused to submit its right to contract out work to arbitration?" (Br. for Defendant-Appellant, p. 8).

Accepting this view, that only a single issue was presented by Paragraphs I and II, the court of appeals reversed the district court and directed "that plaintiff's motion for summary judgment be denied and defendant's motion allowed" (R. 53). Since the Company's motion sought summary judgment on both parts of the complaint, the court of appeals' order directing that the motion be granted would necessarily require the district court to vacate its original order and judgment, including both the portion granting summary

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[1] The district court's decision can be justified on the theory that Article II, Section 10A(3) of the agreement creates an implied contractual obligation on the part of the Company to adhere to past practice. On this theory, any claim that the Company has departed from past practice is also a claim that the Company has violated the agreement and is therefore subject to arbitration under Section 10A(1).

judgment for the Union on Paragraph I, and the portion denying summary judgment to the Company on Paragraph II and dismissing that Paragraph as moot.

It is clear, therefore, that both Paragraphs I and II of the complaint are now before this Court. The Company moved for summary judgment on both paragraphs of the complaint and the court of appeals directed that summary judgment be entered for the Company on both paragraphs.

While there thus can be no doubt that both issues in this case are before this Court, it is apparent that the Company, the court of appeals, and perhaps the district court as well, failed to understand that the complaint does indeed raise two separate issues. The Company has argued this case, and both courts below decided it, as if it presented the single issue of whether contracting out was a subject about which arbitration is required. Thus, the Company and both courts seemed to assume that the two paragraphs of the complaint are simply alternative grounds for the same relief—an order directing arbitration of the subject of contracting out.

But the agreement does not provide for arbitration of "subjects." It provides for arbitration of questions. Whether or not a particular grievance is arbitrable depends not upon the subject matter of that grievance, but on the nature of the question raised with respect to that subject matter.

Under Section 10A(1) of Article II, any "alleged violation of the terms of this agreement" is arbitrable. Thus, a grievance which claims that the Company has violated the agreement is subject to arbitration—irrespective of whether the subject of the grievance is wages, seniority, contracting out, or anything else. But the only question which the arbitrator can decide, under that section, is whether the Company's action violated the agreement.

Similarly, any claim by the Union that the Company has departed from past practice is arbitrable under Article II, Section 10A(3), so long as the subject matter relates to working conditions. But the only question the arbitrator can

decide, under that section, is whether the Company did not comply with, or modified, its past practice, policy, custom, or usage.

Under neither section would a grievance which claims that the Company had done something "unfair" or "unlawful" be arbitrable, irrespective of its subject matter, because the Company has not agreed to arbitrate the fairness or legality of its conduct. Under Section 10(D) such a grievance, if related to wages, hours of employment, or any other condition of employment, could be settled by a strike.

Thus, the two Paragraphs of the Union's original complaint are not alternative grounds for reaching the same result, as the Company and both courts below seem to have assumed. Rather, they are two separate claims, both of which are before this Court because the court below directed that summary judgment be entered for the Company on them. If, as we contend, the grievance is arbitrable under both sections of the agreement, then the Union is entitled to present both issues raised by the grievance to the arbitrator.

II. THE COMPANY'S ARGUMENT ON THE MERITS IS SQUARELY IN CONFLICT WITH *AMERICAN MANUFACTURING* AND *WARRIOR & GULF*.

The Company's brief labors mightily, but fails utterly, to distinguish the agreement involved in this case from those which were before the Court in *American Manufacturing* and *Warrior & Gulf*.

The Company starts with the premise that, under the agreement in this case, not all questions which are subject to the grievance procedure are subject to arbitration. From this premise, the Company somehow draws the conclusion that one of the limitations contained in the agreement is that only grievances dealing with subject matters which the parties agree, or a court finds, are dealt with in the agreement are subject to arbitration.

This argument is a *non sequitur*. It is true that the arbi-

tration clause in this case is phrased in terms of limitations, and that not all matters which are subject to the grievance procedure are subject to arbitration. But that is not the question in this case. No one is arguing that the arbitration clause involved here is unlimited.

The question which this Court must decide is whether the particular grievance here falls inside or outside the limitations on arbitration established by the agreement.

We have already demonstrated in our principal brief that the arbitration provision in this case is indistinguishable from those which were involved in *American Manufacturing* and *Warrior & Gulf*. And the Court plainly held in those cases that under this type of arbitration clause a grievance which claims that there has been a violation of the agreement is subject to arbitration, irrespective of the court's view as to whether there has in fact been a violation, and irrespective of the court's view as to whether the particular subject matter of the grievance is even dealt with in the agreement.

As we also pointed out in our original brief, there is a substantial body of arbitration opinion holding that the typical recognition clause in a collective bargaining agreement, such as the one involved here, does impose some restrictions on management's right to contract out work. There are at least 23 reported arbitration awards so holding.[2] Since the parties in this case have agreed that an arbitrator, and not the courts, should interpret their agreement, it would obviously be improper for a court to deny arbitration of the grievance in this case because *it* believes that the recognition clause does *not* limit management's freedom to contract out work.

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[2] In our original brief, we referred to the tabulation of arbitration awards on contracting out contained in *Celanese Corp.*, 33 Lab. Arb. 925, 942-43 (1959), which shows that there were 16 cases as of 1959 in which arbitrators had so held. A more recent study shows that there are at least 7 more such awards since the decision in *Celanese*. Greenbaum, *The Arbitration of Subcontracting Disputes: An Addendum*, 16 Industrial and Labor Relations Review 221, 225 (1964).

That is precisely the kind of question which the parties have provided should be decided by an arbitrator.

We wish to make only one further comment on the Company's argument on the merits. In our original brief, we stated that the agreement involved in this case was executed before the earlier litigation between the parties was decided by the court of appeals. The Company points out that the parties extended the agreement after the court of appeals' decision in the earlier case, and contends that this extension should be construed as a ratification of the court's original decision.

It is questionable whether the mere extension of an existing agreement should be treated as if it were a renegotiation of the agreement. But, in any event, the extension to which the Company refers took place on August 10, 1960. By that time, this Court had already decided *American Manufacturing* and *Warrior & Gulf*. If we are correct in our argument that those decisions necessarily overruled the Seventh Circuit's earlier decision, then surely the Union was not required to seek an amendment to the agreement in order to avoid the effects of an erroneously decided case. On the contrary, this Court's decisions put the Company on notice that the Seventh Circuit's earlier decision was erroneous, and that the agreement would have to be changed if the Company wished to avoid in the future the arbitration of grievances such as the one involved in the earlier case.

III. THIS ACTION IS NOT BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

In our main brief, we pointed out that, in relation to the earlier case, this case involves a different grievance arising out of a separate and unrelated Company action, and that therefore there could be no claim of *res judicata*. We then advanced three distinct reasons why it would be improper to apply the doctrine of collateral estoppel, as urged by the Company, to prevent the arbitration of all grievances which

involve the contracting out of work irrespective of their particular facts. If we are correct in any one of these arguments, the defense of collateral estoppel must fail. The Company has argued extensively against each of these contentions. We shall review their arguments briefly.

1. We showed in our main brief that a decision adjudicating the meaning of one contract is not binding, as a matter of collateral estoppel, in an action involving a different contract, even if the contractual language is the same. (Pet. Br. 25-26). While the Company cites cases which it claims hold to the contrary, it is clear from a reading of those cases that they do not support the Company's claim.

But the Company also advances another, possibly more valid consideration. It says that successive collective bargaining agreements should not be treated as separate contracts but as "a continuing statement of the whole employment relationship of the industry or plant." The Company argues from this that whatever the rule may be with respect to ordinary contracts, an interpretation rendered under a collective bargaining agreement should "as a matter of national labor policy" preclude relitigation of the same question "until the parties negotiate some change" in the relevant language. (Resp. Br. 42-43).

This is an attractive argument, although it would seem more properly an argument in favor of *stare decisis*, not collateral estoppel. The question of the application of *stare decisis* to successive collective bargaining agreements has been much discussed by arbitrators in connection with the substantive provisions of collective bargaining agreements.[3] Fortunately, the implications of this question for collateral estoppel purposes need not be decided in this case, since there are two other and wholly adequate bases on which to dispose of the collateral estoppel issue.

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[3] See, e.g., *Bethlehem Steel Co.*, 20 L.A. 87 (Seward, 1953); *Federal Bearings Co.*, 22 L.A. 721 (Justin, 1954); *Ford Motor Co.*, 30 L.A. 46 (Platt, 1958).

2. In our main brief we demonstrated that the doctrine of collateral estoppel is inapplicable if "a change or development in the controlling legal principles" makes the earlier determination "obsolete or erroneous, at least for future purposes . . ." *Commissioner* v. *Sunnen*, 333 U. S. 591, 599. (Pet. Br. 24-25). The Company concedes that there can be no collateral estoppel where "a decisive change in the law" renders the earlier decision obsolete (Resp. Br. 48).

Whether the proper standard is the one stated by this Court or the one stated by Respondent is immaterial. For it has been universally recognized that this Court's subsequent decisions in *American Manufacturing* and *Warrior & Gulf* constituted a decisive change from the view of the law reflected in the Seventh Circuit's first decision and the decisions of other lower courts.

This is clear, first, from the fact that this Court in those very cases was reversing decisions of the Sixth and Fifth Circuits. It is clear, further, from the statement in the dissenting opinion in *Warrior & Gulf*, that "the Court today departs the established principles" of earlier commercial arbitration decisions. It is likewise clear from the subsequent statements of both courts and commentators. See, e.g., *Sinclair Refining Co.* v. *N.L.R.B.* 306 F. 2d 569, 570 (5th Cir. 1962)[4]; Hays, *The Supreme Court and Labor Law*, 60

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[4] Perhaps the most eloquent recognition of the change is that of Judge Brown in *Sinclair*:

> "Time and tide, it is said, waits for no man. Neither does the law. For we may acknowledge that in all likelihood the result of this decision is different from what it would have been just five years ago. What has brought this about is not the slow but sure erosion of cherished and ancient precedents or the most spectacular overruling of them by name. Neither has it been the consequence of new legislation. What has brought this about is the recent judicial declaration of an intervening Congressional policy which in turn calls for judicial adaptation and accommodation . . .
>
> ". . . The intervening event regarded by us as portentous is the action of the Supreme Court in the trilogy concerning enforce-

Colum. L. Rev. 901, 919 (1960); Note, 46 Cornell L.Q. 336 (1961); Levitt, *The Supreme Court and Arbitration,* NYU Fourteenth Annual Conference on Labor 217 (1961); *Report of Special Warrior & Gulf Committee,* 1963 Proceedings of ABA Section of Labor Relations Law, Part II, p. 196; *Minority Report, Special Warrior & Gulf Committee,* id. at p. 208.

Indeed, the district court in this very case stated that "Had *Warrior* been decided prior to *Independent Petroleum Workers* v. *Standard Oil Co.*, I think the outcome would have been different" (R. 41). And the Seventh Circuit has elsewhere intimated that it shares this view. *United Auto Workers* v. *Webster Elec. Co.* 299 F. 2d 195, 196-97 (7th Cir. 1962).

In any event, this Court's decision on the merits of the present case will dispose of this issue as well. For if this Court holds, as we contend it must, that the principles enunciated in *American Manufacturing* and *Warrior & Gulf* entitle the Union to arbitrate the grievance in the present case, then necessarily the Seventh Circuit's decision in the first case—that the Union was not entitled to arbitrate a similar contracting out grievance—represented a view of the law which has been rendered obsolete by the subsequent decisions in *American Manufacturing* and *Warrior & Gulf.*

3. Finally, we demonstrated in our main brief that the decision in the first case could not in any event bar litigation concerning Section 10A(1) of the agreement, for the Union's rights under Section 10A(1) were not litigated in the first case and "a judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of law not litigated in the first action." Restatement, Judgments § 70 Comment c (1943). (Pet. Br. 22-24). The Company does not dispute that the present case

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ment of agreements to arbitrate." [Citing *American Manufacturing, Warrior & Gulf;* and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).]

involves a different cause of action from the first case. Nor does it disagree with our statement of the controlling legal principle. Its sole contention is that the present case involves only one question of law, the same question as that in the first case—"whether the defendant Company had agreed to arbitrate its right to contract out the work" (Resp. Br. 43). This argument is simply another aspect of the Company's misunderstanding of the issues in this case, to which we have referred earlier.

In the prior case, the sole issue was whether "the grievances concerning performance of maintenance and repair work by an independent contract are arbitrable *under the provisions of Section 10A(3) of the agreement* referring to past practices relative to working conditions." (275 F. 2d at 708, emphasis supplied). The Seventh Circuit's decision was that "the language of *Section 10A(3) of the agreement* . . . does not include within its scope the subject of contracting out. . . ." (*Id.* at 709, emphasis supplied.)

The present case involves in addition the Union's claim to arbitration under Section 10A(1). And, contrary to Respondent's assertion, this is not simply another "argument" for granting the same relief as was sought in the first case, and as is sought here under Section 10A(3). If arbitration were ordered solely under Section 10A(3), the only question to be decided by the arbitrator would be whether the Company's action violated past practice. If arbitration were ordered solely under Section 10A(1), the only question to be decided by the arbitrator would be whether the Company's action violated the terms of the agreement. The Union in this case thus seeks to arbitrate two entirely separate questions. And the Seventh Circuit's first decision did not decide, one way or the other, whether it is entitled to arbitrate the latter question.

As we have said, arbitrability is determined not by the subject matter of the grievance, but by the nature of the claim made in the grievance. A grievance claiming that a

particular act of contracting out is "unfair" would be non-arbitrable, *not* because it is a contracting out grievance, but because the Company has not agreed to arbitrate the "fairness" of its conduct. A judicial decision denying arbitration of such a grievance surely would not preclude the Union from subsequently seeking arbitration of a grievance that another act of contracting out violated past practice (10A (3)) or violated the terms of the agreement (10A(1)). Likewise the Seventh Circuit's first decision—that the Company has not agreed to arbitrate claims that its acts of contracting out violate "past practice"—cannot preclude a subsequent suit to arbitrate a grievance claiming that a different act of contracting out violates "the terms of the agreement."

CONCLUSION

For the reasons set forth in our main brief, and in this reply brief, the judgment of the court below should be reversed, and the Company should be ordered to arbitrate the grievance under both Sections 10A(1) and 10A(3) of Article II of the agreement.

Respectfully submitted,

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